

June 2002

Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Machipongo: Key Victory on Parcel and Nuisance Issues

Fresh on the heels of victory in the Supreme Court in *Tahoe-Sierra*, community rights scored another important win in the Pennsylvania Supreme Court on May 30, 2002. In *Machipongo Land and Coal Co. v. Commonwealth*, 2002 WL 1070113, the court unanimously reversed a lower court's ruling that mining restrictions designed to protect water quality worked a taking.

QUOTE OF THE MONTH

The government is not required to pay Property Owners to refrain from taking action on their land that would have the effect of polluting public waters. Indeed, despite our conviction that private property rights are to be strongly protected, we are struck by the impropriety of taking action that would require the General Assembly to pay someone not to pollute public water or destroy public fisheries.

Machipongo Land & Coal Co. v. Commonwealth, 2002 WL 1071013 (Pa. May 30, 2002)

The state's environmental protection agency designated a portion of Machipongo's land "unsuitable for mining" in May 1992 to protect the Goss Run watershed. The designation was based on findings that coal mining within the watershed has a high potential to increase pollution in Goss Run, thereby impairing the use of the stream as an auxiliary water supply and habitat for trout. Machipongo owns 1,000 acres of land in the area, and the mining restrictions covered some 373 acres. Machipongo and other affected property owners claimed the regulation took their property without compensation.

A key issue in the case concerned how to define the relevant parcel. The *Machipongo* court noted that although *Lucas* and *Palazzolo* might have created some confusion regarding parcel definition, *Tahoe-Sierra* reaffirmed the validity of the parcel-as-a-whole rule. The court therefore concluded that the right to mine coal could not be separated from the surface rights. Because Machipongo's parcel as a whole retained considerable value, the court found no categorical taking of its land.

The court also overturned the lower court's ruling that coal mining could not constitute a public nuisance. The court made clear that the nuisance inquiry is flexible, stating that "[t]he rules and understanding as to the uses of land that are acceptable and unacceptable have changed over time." It held that "the public has a right not to suffer acid mine discharge into its public waters," and that "if the Commonwealth is able to show that the Property Owners' proposed use of the stream would unreasonably interfere with the

public right to unpolluted water, the use, as a nuisance, may be prohibited without compensation." The ruling may be the most expansive application of nuisance principles by any court in a takings case. Indeed, the court held that the Commonwealth need not show a certainty of harm, but instead should prevail if it can show simply that there is a "high potential" that mining would harm the stream. *Machipongo* is a must-read for any government attorney defending environmental protections against takings attacks.

Kudos to Joe Pizarchik and his colleagues in the Pennsylvania Attorney General's office. CRC filed an amicus brief on behalf of a large coalition of municipal groups in support of the state.

EYE ON WASHINGTON: The Block Nomination

With exclusive jurisdiction over most takings claims against the federal government, the Court of Federal Claims (CFC) already has several judges who distort the Takings Clause to thwart environmental protections. Now Congress is about to consider another extreme nomination, Lawrence Block.

During much of the 1990s, Block was the lead Senate staff proponent of legislation to redefine takings in a manner that would have required the government to pay compensation for even slight diminutions of value. Although these bills would have overturned decades of Supreme Court jurisprudence, Block asserted that the measures would only codify existing law on what constitutes a takings.

Block's record on takings issues indicates he would have few qualms adopting a radical takings compensation standard similar to the one he promoted in Congress. The nomination may come before the Senate Judiciary Committee within the next few weeks, and we are urging the committee to reject the nomination. We'll keep you posted on developments.

ON THE HORIZON: High Court to Hear 2nd IOLTA Case

In our October and November 2001 issues of *Takings Watch*, we predicted that the U.S. Supreme Court would jump back into the fray over "Interest on Lawyers Trust Accounts" (IOLTA) programs. On June 10, 2002, the Court did exactly that, granting certiorari in *Washington Legal Foundation v. Legal Foundation of Washington*, No. 01-1325.

All 50 states have IOLTA programs that use the interest on funds deposited by clients with their lawyers to generate tens of millions of dollars for legal aid services for the poor. When considering the takings implications of IOLTA programs, the key fact to keep in mind is that no client funds qualify for the program unless they are so small and held for such a short duration that they could not generate net interest (interest minus any bank fees) for the client on their own. Under the IOLTA program, the funds are pooled and thus generate interest. The clients do not lose a penny because without the IOLTA program, no interest would be generated at all. No harm, no foul, one might say.

The Court's first foray into IOLTA occurred in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), where

the Court held that the interest produced by IOLTA accounts is the property of the clients. Now the Court will decide two issues expressly left open in *Phillips*: whether IOLTA programs result in a taking of private property and, if so, whether any just compensation must be paid. The case also will decide when injunctive relief is available in takings cases.

The lead plaintiff in the campaign against IOLTA is Washington Legal Foundation, a non-profit group with little to gain except the satisfaction of depriving poor people of needed legal services. One federal judge compared the plaintiffs to the dog in Aesop's fable who refused to allow the cow into the manger to feed on the hay, even though the hay was of no use to the dog.

The Supreme Court's ruling will resolve a conflict between the Ninth Circuit, which ruled en banc to uphold IOLTA, and the Fifth Circuit, which struck down the Texas IOLTA program last October. Stay tuned.

OUTRAGE OF THE MONTH

California Takings Initiative Qualifies for Ballot

Smart growth advocates in California's pristine Nevada County face an ominous challenge in November. The Nevada County Elections Office announced May 24 that the "Property Owner Claims Reimbursement Process Initiative" had qualified for the ballot in this year's election. The initiative, promoted by the California Association of Business, Property and Resource Owners, would require the county to pay property owners for land-use regulation that diminishes the value of their property (subject to a narrow nuisance exception). The initiative would also allow property owners to present such "takings" claims directly to the Superior Court, without first seeking lower court review.

Such a "one-size-fits-all compensation mandate" would seriously increase the cost of community protections, hindering the county's ability to manage its growth and react to changing conditions. Moreover, by bypassing normal procedural and legal requirements for establishing a takings claim in the courts, the proposed initiative threatens to displace 200 years of takings jurisprudence. All of this has the American Planning Association "watching in horror" and the Pacific Legal Foundation, which helped with early drafts of the proposal, predictably cheering.

If passed, the initiative would serve as a dangerous precedent for municipalities throughout the region. Nevada County voters will decide the fate of this referendum — and the county's community planning efforts — in November.

Happy Birthday TW

Takings Watch, a journalistic tradition since May 2001, recently hit the one year mark. We thank our hundreds of loyal subscribers for making *Takings Watch* a success. In view of recent reader inquiries, we note that CRC's web site, www.communityrights.org, contains "Collections" of previous *Takings Watch* columns in html format, which are suitable for copying and pasting.

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